CONSTITUTIONAL PROVISIONS AGAINST FORCING SELF-INCRIMINATION.

The rule of our law, which is embedded in our constitutions, that no one shall be compelled to criminate himself, ought to be abolished, at least in criminal cases. The reasons for it have ceased to exist, and it is now merely a protection to rogues against justice. it, like some other rules of criminal law, was introduced *in favorem vitae* at a time when nearly every serious crime was punished with death, and when an accused person was not allowed the aid of counsel or compulsory process for his witnesses, and when, under an exceedingly comprehensive and vague law of treason, and with compliant judges, charges of that crime or some related crime of an equally indefinite nature might afford a ready means to persons in power of getting rid of political opponents and troublesome persons. In various ways our criminal law shows the influence of precautions taken to protect the subject against the crown.

Those conditions have passed away, and an accused person's rights are now amply protected. There remains only one possible reason for maintaining the rule that a person should not be compelled to criminate himself, namely, the apprehension that ignorant, stupid or timid defendants—and most persons tried for crime are of that sort—may be entrapped or frightened into admissions of crimes of which they are not guilty.

That objection was plausible so long as we had not the testimony of experience. But experience has shown that that danger does not exist. The statutes permitting accused persons to testify in their own defense, which now have been enacted everywhere, were at first strongly opposed on the same theoretical ground. But as far as I have been able to observe in the course of my legal practice or to find out by reading, an innocent person always desires to go upon the stand while a guilty man seldom wishes to; and I have never known or heard of a case where an innocent person suffered any disadvantage from doing so. It stands to reason. The truth is consistent with itself, and every one who is speaking the truth can tell in the main a straight story. And juries are quick enough to perceive and make allowance for the slight slips and discrepancies into which an honest witness falls from timidity,

confusion, forgetfulness or want of facility of expression. If a defendant who is really innocent chooses to invent lies to make a better case for himself, and being caught in his lies, is adjudged guilty, he deserves all that he gets. At all events it is not worth while in order to protect such liars against the possible consequence of their lies, to deprive the courts of a valuable instrument for getting at the truth and to allow many criminals to go unwhipped of justice.

I do not propose that persons accused or suspected of crime should be subjected to the abominable inquisitory process and the mental tortures, still practiced in some countries. I advocate a fair and carefully guarded proceeding. I think it ought to be provided that in a criminal trial or a preliminary examination before a magistrate on a criminal charge, the defendant should be subject to questioning and that neither he nor any witness should have the right to refuse to answer any question, relevant and otherwise proper, because the answer would incriminate him in respect to the criminal matter under investigation or any criminal matter connected therewith—perhaps any criminal matter. Also, before any criminal proceeding has been begun or any charge of crime made against any individual the prosecuting officer should, on affidavits showing probable cause to believe that a crime has been committed and that a certain person knows something about it, be able to obtain from a judge an order for the appearance of such person before an examining magistrate or a grand jury for examination; nor should such person be allowed to refuse to give every relevant information that he has because of incriminating himself. Possibly some restrictions upon the right of examination might be expedient in regard to some sexual crimes.

If the above suggestions were adopted, it is believed that many criminals would plead guilty who now take their chances on a trial, and thus much expense would be saved to the public.

But the most important reason in their favor is that the crimes which are now most prevalent and injurious to the community are crimes of a fraudulent and secret nature, generally with an element of conspiracy or combination in them, such as combinations to cheat private persons or the public, all that criminal conduct that is denoted by the slang word "graft," criminal agreements in restraint of trade, unlawful rebates and other arrangements by railroad officials, or frauds by officers of corporations. Such crimes are easy to cover up by various innocent looking devices, and in fact,

are rarely punished. The facts are usually known only to the criminals or their accomplices, who cannot be compelled to testify as the law now is. Generally prosecuting officers do not prosecute, thinking the attempt hopeless for want of evidence; and when they do prosecute, the prosecution generally fails for the same reason. The recent experience of Mr. Jerome in his crusade against the New York gambling houses is instructive. Although the character of the houses was notorious, yet for months the district attorney was entirely unable to get evidence to prove that gambling went on there. But just as soon as a statute was passed compelling frequenters of those resorts to testify, notwithstanding that they might be obliged to impute crime to themselves, the gambling-house keepers surrendered.

How to deal with great business combinations, trusts, monopolies and large corporations that have recently grown up among us is one of the most serious problems that now confront the people. No one seems to know what to do. Whatever plan is adopted, however, it is plain that the criminal law will have an important part to play in it. Certain kinds of acts must be made criminal, if they are not so now, and the individuals who do such acts must be punished. It is of little use to take any sort of legal proceedings against the corporations, the artifical persons. The offending individuals must be reached and treated as criminals. But this cannot be done effectively so long as the rule that a person need not incriminate himself stands. That rule cripples the administration of the criminal law, and makes it an almost useless weapon against the evils and abuse of combination. The Standard Oil monopoly grew up by illegal rebates from the railroads. I am not now expressing any opinion as to whether the Standard Oil combination or the so-called trusts generally are injurious to the community or are legitimate business developments under present conditions. Whichever they are, they need at least regulation and control by the state, and certainly should not be permitted to continue and maintain themselves by unlawful acts. Now can there be any doubt that, if the managers of the Standard Oil combination and the officers and agents of the railroads could have been called before an examining magistrate, subjected to a searching examination and compelled to produce books and papers, an able and courageous prosecuting officer could have squelched the monopoly so far as it depended on illegal or criminal methods? It is necessary to repeal the provision in question to enable the community to protect itself against the evils of trusts and combinations. Perhaps that

rule does not do much harm in the case of the simple and gross crimes which are committed by ignorant persons and common criminals, but it is a serious obstacle to justice in the kinds of crime that are now most important and troublesome.

There is, too, a moral side to the matter. The prevalence of dishonesty, unfaithfulness to trusts, "graft" in all its forms, both in public and in private business, points to a serious moral falling away and is raising gross apprehensions in the minds of thoughtful persons. The causes of this are various, and there is not a single and speedy cure. Among these causes, however, not perhaps the most important of them, but still one that has considerable effect, is the inefficiency of the criminal laws against fraud. It is often said, and with truth, that you cannot make men good by statute. But that is a half truth only. It is also true that the laws, especially the criminal laws, react on the morals of the community. When certain conduct is condemned and punished by law, even if at first the law is a little in advance of public sentiment—if it is too far in advance it cannot be enforced—the public conscience will seldom fall below the level of the law. If we had, as we ought to have, a much more sweeping and stringent criminal law against fraud, breach of trust and graft, and that law was vigorously enforced, there can be no doubt that it would stiffen up the moral backbone of the community. It would not perhaps be a very difficult matter in the present temper of the people to get such a law passed, if competent persons who command the respect of the community would take the pains to have a bill drawn up and presented to the legislature. But it could not be enforced, even by the ablest and most energetic prosecuting officer, so long as the only persons who ordinarily know the facts could not be made to disclose them. The provision of not criminating oneself should be repealed for the sake of public morals.

Henry T. Terry.